(27)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 998 of 2002

Birsingh & two others

Versus

State of Chhattisgarh

JUDGMENT

Noted.
16/5/07
G.A

Post for: 16.05.2007

Sd/-
Sunil Kumar Sinha
Judge
15.05.2007

(28)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 998 of 2002

APPELLANTS

1. Birsingh, S/o Kartik Ram, Student, Aged 20 years.
2. Kartik Ram, S/o Chamaru, Aged 45 years.
3. Sitaram, S/o Kartik, Aged 26 years.

All residents of Village: Dhanaura, P.S. – Bijapur, Distt. Dantewada (C.G.)

Versus

RESPONDENT State of Chhattisgarh, Through P.S. – Bijapur, Distt. Dantewada (C.G.)

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri Subhash Yadav, counsel for the appellants.

Shri Arun Sao, Govt. Advocate for the State.

JUDGMENT
(16.05.2007)

Sunil Kumar Sinha, J.

(1) This appeal is directed against the judgment of conviction and order of sentences dated 3.8.2002 passed in Sessions Trial No. 518/2001 by the Second Additional Sessions Judge, Jagdalpur (Bastar), whereby, the said Court after holding appellant No.1 guilty of offence punishable under Section 376 (1) I.P.C. sentenced him to undergo R.I. for 7 years and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo R.I. for 1 year. Appellants No. 2 & 3 were convicted

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under Section 323 I.P.C. and were sentenced to pay a fine of Rs. 500/-, in default of payment of fine to undergo S.I. for 1 month.

(2) Appellant No.1 was charged with the offence punishable u/ss 376, 456 & 506 Part-II I.P.C., whereas two other appellants were charged u/ss 323 and 506 Part-II I.P.C.

(3) The case of the prosecution is that on 28.8.2001 at about 6.30 p.m., the prosecutrix namely- Ku. Malti (P.W.-3) had gone to the house of *Up-Sarpanch*, Telamganga for receiving the paddy on account of labour work rendered by her. By chance, at that time, nobody was there in the house of *Up-Sarpanch*. The allegations are that taking advantage of the said situation, appellant No.1 Birsingh came over there and caught hold of the prosecutrix, threw her on the ground and then, he undressed her and he also undressed himself and thereafter committed sexual intercourse against her. The further case of the prosecution is that on hearing hue and cry of the prosecutrix, Smt. Mala, Smt. Bageshwari (P.W.-8) and Smt. Mandi (P.W.-5) came over there and they witnessed the incident. After seeing them, appellant No.1 ran away from the place of occurrence. These ladies took the prosecutrix to her mother, where she narrated the story and thereafter, on the next day, a village *Panchayat* was convened. The further allegations are that in the said *Panchayat*, the appellants threatened the mother of the prosecutrix for causing her murder by knife and they also scuffled with her, in consequences of which, the proceedings of

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Panchayat could not take place and the report Ex.-P/8 was lodged.

(4) The knife was seized from the mother of the prosecutrix and the prosecutrix as well as her mother both were sent for medical examination. The clothes of the prosecutrix were also sent for examination. The report of medical examination of the prosecutrix was obtained vide Ex.-P/1 and the medical report of the mother of the prosecutrix was also received vide Ex.-P/3 and after completion usual investigation, the charge-sheet was filed and respective charges were framed under the aforementioned Sections of I.P.C. against the accused persons.

(5) The learned Additional Sessions Judge recorded a finding that the charges u/ss 456 & 506 Part-II I.P.C. were not proved against appellant No.1. However, he held the charge u/s 376 I.P.C. to be proved against him.

(6) For appellants No.2 & 3, the said Court also recorded a finding that the charges u/s 506 Part-II were not proved against these appellants but charges u/s 323 I.P.C. were proved against them.

(7) So far as appellant No.1 is concerned, his conviction is based upon the testimony of prosecutrix, Ku. Malti (P.W.-3) and conviction of other two appellants are based upon the evidence of Ku. Malti (P.W.-3) and Smt. Rukmani, (P.W.-4) mother of the prosecutrix.

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(8) Learned counsel for the appellants argued that on the basis of evidence of the prosecution witnesses, it is apparent that this matter is one of consent and the conviction of appellant No.1 u/s 376 I.P.C. cannot be sustained. For appellants No. 2 & 3, he argued that no case u/s 323 I.P.C would be made out against them.

(9) On the other hand, learned counsel for the State opposed this argument and supported the judgment of conviction and order of sentences passed by the Sessions Court.

(10) I have heard learned counsel for the parties at length and have also perused the records of the sessions case.

(11) Admittedly, Ku. Malti was aged about 18 years on the date of incident. The clinical observation regarding her age is 18 years and in her ossification test also, she was found in between 18-20 years, which has not been disputed by either of the parties.

(12) Ku. Malti (P.W.-3) deposed that on the fateful day, she had gone to the house of *Up-Sarpanch*. Appellant No.1-Birsingh came over there and caught hold of her and thereafter, he took her in the house of *Up-Sarpanch*, where he undressed her by putting off her *saree* and *peticoat*. Birsingh was wearing fulpant. He put off his fulpant. He was also wearing underwear which he also put off and thereafter, he got her laid down on the floor and committed sexual intercourse against her. She deposed that when she made hue and cry, Smt. Mandi (P.W.-5) came over

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there, who gave her *saree* and *petticoat*, which she could wear and Mandi took her to her mother. Vide para-3 of her evidence, she deposed that thereafter, a *Panchayat* was called and in the said *Panchayat* her mother was also present along with other villagers. In that *Panchayat* father of appellant No.1 namely-Kartik Ram (appellant No.2) tried to assault her mother and threw her and the *Panchayat* could not convene. She further deposed that at that time, appellant No.3-Sitaram was keeping a knife in his hands and was trying to assault them with the knife.

(13) Smt. Mandi Bai (P.W.-5) deposed that appellant No.1 was lying on the prosecutrix. The prosecutrix was weeping in *Varandh* of her house. She was declared hostile by the prosecution. She had admitted in cross examination that the prosecutrix has told her that she was subjected to forceful sexual intercourse by this appellant No.1 in the house.

(14) Telam Bageshwari (P.W.-8), who is a member of the house of *Up-Sarpanch*, deposed vide para-2 that when she had gone to fetch water, appellant No.1- Birsingh had caught the prosecutrix in the *Varandh* of her house. Appellant- Birsingh had undressed the prosecutrix and he was lying over her and was committing sexual intercourse and when she could notice all this, she went to call the mother of the prosecutrix but by that time, the appellant-Birsingh had already left the place of occurrence and the prosecutrix was all alone in her house. She further deposed that the prosecutrix told before her mother that when she had gone to her house for receiving the paddy on account of labour

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work rendered by her, the appellant-Birsingh had committed sexual intercourse against her.

(15) On the basis of evidence of these witnesses as also on the basis of other evidence on record, it appears that the prosecutrix was a consenting party with appellant-Birsingh. The evidence of the prosecutrix is quite un-natural, while she is making allegations against the appellant-Birsingh that when she had gone to the house of *Up-Sarpanch*, for receiving the paddy on account of labour work rendered by her, she was caught by this appellant and he forcefully committed sexual intercourse against her. She deposed that appellant No.1 caught hold of her and thereafter took her inside the house of *Up-Sarpanch*, where nobody was present. The appellant firstly put off her *saree* and thereafter, he also put off her *petticoat* and when she became completely naked , the appellant put off his own fulpant, thereafter his underwear and then, after getting her laid down on the floor, he committed sexual intercourse against her. It is at this stage, one of the inmate of the house namely- Telam Bageshwari (P.W.-8) came there, who had gone to fetch water, and she could see that the appellant was committing sexual intercourse against the prosecutrix. P.W.-8 has not stated that at that time, the prosecutrix was making any resistance against the appellant. According to her evidence, she was a silent participant in the the process of sexual intercourse committed by the appellant against her. She also did not disturb them and had gone to call the mother of the prosecutrix. The conduct of

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the prosecutrix, in not making any resistance while putting off her clothes and causing her completely naked and thereafter further not making any resistance when she was made to lay down on the floor and also at the time of unwearing of his own dress by the appellant and further silently allowing him to commit intercourse against her goes to show the conduct of the prosecutrix and in the facts and circumstances, referred to above, a possibility of the prosecutrix being a consenting party cannot be fully ruled out in this case.

(16) For the reasons stated above, the matter appears to be one of consent and the conviction of appellant No.1 u/s 376 I.P.C. does not appear to be proper. He deserves to be acquitted.

(17) So far as appellants No. 2 & 3 are concerned, there are no cogent and reliable evidence against them to hold them guilty of offence punishable under Section 323 I.P.C. The evidence of prosecutrix (P.W.-3) and her mother Smt. Rukmani (P.W.-4) in regard to scuffling and assault on the day of village *Panchayat* is shakey and no conviction can be based on such evidence. Therefore, these 2 appellants also deserve to be acquitted in this case.

(18) In the result, the appeal is allowed. The conviction and sentences awarded to the appellants are set aside. The appellants are acquitted of the charges framed against them.

Sd/-
Sunil Kumar Sinha
Judge

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